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No. 2594.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. G. NOYES, as Receiver of Washington-Alaska Bank, a Corporation,

Appellant,

vs.

R. C. WOOD,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

This was an action brought by Noyes, as receiver for the Washington-Alaska Bank, a corporation formerly known as Fairbanks Banking Company, to recover of the defendant Wood the sum of $13,000.00, which grew out of the following transaction:

The Fairbanks Banking Company was originally a partnership, consisting of the defendant Wood, one Hill and one Barnette. The company closed its doors in the latter part of 1907, and a reorganization was projected by the depositors. At the time of the proposed reorganization, the defendant Wood was in

Seattle. A meeting was held at Fairbanks, and an investigation was had into the assets of the partnership, and as a result it was decided to form a new corporation, to be known as the Fairbanks Banking Company, and to be chartered under the laws of Nevada, for the purpose of taking over the assets of the partnership. A committee was appointed which investigated the assets, and after so doing fixed a valuation on the equities of the partnership at $288,000.00. Under the terms of the partnership agreement its capital, consisting of $200,000.00, was advanced by Barnette. He had a one-half interest in the profits of the partnership, and Wood and Hill each one-quarter. Under the arrangement made with the stockholders, it was agreed that Barnette should leave on deposit with the corporation the sum of $200,000.00, and his share of the equity above that, $44,000.00, issued to him in stock of the new corporation. Wood and Hill likewise were each to be entitled to $22,000.00 worth of stock in the new company; this representing their interest. They were to have until July 1, 1905, to elect whether to take money or stock. A contract was accordingly drawn up. It was signed by the new corporation and likewise by Barnette and Hill. Barnette also subscribed Wood's name to the agreement, although Wood was at that time still in Seattle and there was nothing to show that Barnette had any authority to sign Wood's name. Before the transaction was finally consummated, the amount which was coming to the

partners was by agreement with the corporation reduced from $288,000.00 to $252,000.00. This made the proportionate share of Wood $13,000.00. Upon his return to Fairbanks, Wood signed the agreement, but at the time he did so he had an understanding with the officers of the bank that he should have until July 1st, 1908, to decide whether he would take the $13,000.00 in stock, or would receive the equivalent in money.

The findings of the Court upon this subject are as follows:

VII.

> That * * * in the fore part of January, 1908, a large number of business, professional and mining men * * * met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase and take over and absorb the business of the Fairbanks Banking Company, a copartnership, and at said meeting negotiations were begun by said proposed incorporators with said copartnership for the purchase of the same. That at said meeting a committee was appointed to go into the details of the reorganization of the Fairbanks Banking Company and to report a basis upon which the business should be taken over * * * (p. 70).

VIII.

> That said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be pre-

sented for the consideration of the proposed new corporation * * *

(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later * * (p. 71).

IX.

That said report was on January 6, 1908, submitted to said proposed incorporators and at said meeting the said report was read and passed on section by section, as read, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting (p. 73).

XIX.

That * * * during all of the negotiations * * * defendant Wood was in Seattle (p. 77).

XXI.

That the defendant Wood returned to Fairbanks, Alaska, some time in the month of April, 1908, and upon his return he signed said written agreement so entered into as aforesaid, knowing that the same contained said clause requiring him to take stock for his share of the assets of said partnership so transferred to said corporation in excess of the liabilities thereof as aforesaid, and also knowing that the same did not provide for the payment of said accrued interest, but *with an oral understanding between himself and the officers of said bank that he might have, in accordance with said resolution, until July* 1, 1908, *to elect either to take stock in said corporation or cash for his*

share of the assets of said partnership so transferred to said corporation (p. 77).

XXVI.

That at the first meeting of the Board of Directors, held on the 12th day of March, 1908, the defendant Wood was elected Cashier of said bank, at which time he was then in the City of Seattle, Washington, as aforesaid. Immediate notice was given to him of said election (p. 79).

XXVII.

That said Wood accepted said office of cashier while in the said city of Seattle, and, on the 16th day of March, 1908, entered upon the discharge of his duties as such cashier, and, upon his return to said Fairbanks in April, 1908, as aforesaid, entered actively upon such duties and continued to so act until June 29, 1908, when he tendered his resignation as such cashier, and the same was accepted by the Board of Directors, to be effective at the close of business on June 30, 1908, and one B. R. Dusenbury, who was then assistant cashier, was elected to succeed Wood as cashier (p. 79).

XXVIII.

That at the time said Wood tendered his resignation as cashier, as aforesaid, he demanded that there be paid to him the amount of his interest in said partnership assets, to-wit, $13,000.00 (p. 80).

XXIX.

That a certificate for 130 shares of the capital stock of said corporation had been written up in

the name of the defendant Wood, of the par value of $13,000.00, but the same was never detached from the stock book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908 (p. 80).

XXX.

That on the 30th day of June, 1908, with the knowledge, consent and approval of the officers and directors of said bank, a certificate of deposit was issued to and accepted by the said Wood in the sum of $13,000.00, in lieu of said stock, which said certificate was signed by the said B. R. Dusenbury as assistant cashier prior to the time when the said resignation of the said Wood as cashier became effective, and said shares of capital stock were on the same day charged to treasury stock on the books of said bank (p. 80).

XXXI.

That subsequently the said Wood drew out in cash from the funds of said bank the amount of the said certificate of deposit, to-wit, $13,000.00 (p. 80).

In its opinion the Court said:

"Wood was absent from Fairbanks during all of this time, and did not return until about the middle of April, 1908, and it seems that at this time the agreement with the corporation was signed by him, his name having been signed to the stock subscription list on his behalf by Barnette. He testified that it was distinctly understood between him and the directors at the time he did sign the agreement, that he should have the right to take cash, instead of the par value of the shares subscribed

for, on July 1st, and that as evidence of such understanding there was then shown him the report of the committee of January 5th and the minutes of the corporation, wherein this was set forth. Prior to his returning to Fairbanks he had performed some acts as cashier of the corporation in Seattle, and he continued to act as such cashier until June 30th. On June 29th he tendered his resignation, and on July 1st was paid $13,000.00, the par value of the stock allotted to him. The certificates for this stock seem never to have been in his possession, but to have remained undetached in the stock book of the corporation. Whatever may be said of the rights and liabilities of Wood, under the written agreement of March 16, if this were still an executory agreement, it seems that now, *the agreement having been fully executed, in accordance with what was then the understanding of all the parties, and cash, in place of stock, delivered to Wood, the receiver is not now in a position to set aside this executed contract,* and to enforce the terms of the written contract, although such written contract varies, in some respects, from the one actually carried out by the parties." (No. 2528, p. 1210).

The following stand out boldly from the findings of fact:

1. That on January 5, 1908, the incorporators' committee proposed to give to Wood until July 1, 1908, to decide whether to take stock or cash for his interest in the copartnership. (Finding VIII (g) p. 72).

2. That on January 6, 1908, the proposed incor-

porators formally agreed to this proposition. (Finding IX, p. 73).

3. That Wood was not in Fairbanks until April, 1908. (Finding XXI, p. 77).

4. That Wood first signed the subscription in April, 1908, and at that time there was an oral understanding between him and the officers of the bank that he might have, *in accordance with said resolution,* until July 1, 1908, to elect either to take stock in said corporation or cash for his share of the assets of said partnership. (Finding XXI, p. 77).

5. That the stock certificate for the 130 shares was never detached from the stock book. (Finding XXIX, p. 14).

The findings contain much matter that is foreign to the issues of the case, much that is purely evidentiary matter, and much that is mere conclusion of law.

Appellant's contentions are discussed by him under three heads:

(1). He says: "The secret oral understanding was void."

To which we reply:

I. There was no *secret* oral understanding.

II. There was a conditional stock subscription which gave Wood the right to take cash in lieu of stock.

(2) He asks: "Is Wood liable to the Receiver for the amount received for the surrender of his stock?"

(a) Could Fairbanks Banking Company purchase its own stock, especially out of its capital?

(b) If it could not, can the receiver now recover the purchase money?"

To this we reply:

II. This was not the case of a corporation purchasing its stock but the case of a conditional subscription.

III. The agreement is executed and it is now too late to set it aside.

IV. None but a creditor who was such at the time would have a right to complain.

V. As a condition precedent to this action the stock should have been tendered back.

(3) He contends: "No consideration was received by the bank for this $13,000.00. It is a part of the assets of the bank which were fraudulently given away. The receiver can now recover it as a trust fund."

To this we reply:

VI. The findings do not warrant the statement that no consideration was received by the bank for this $13,000.00.

Finally as an answer to all of appellant's case the appellee urges:

VII. The findings omit to dispose of the affirma-

tive defense of accord and satisfaction and the presumption on appeal is that the evidence upon that point sustained the judgment.

I.

THERE WAS NO SECRET ORAL UNDERSTANDING.

This case is before the Court on the findings. There is no finding that the oral understanding was secret. There is nothing in the findings inconsistent with contemporaneous knowledge and assent on the part of every stockholder and creditor of the corporation.

In *Porter* v. *Plymouth Gold Mining Co.*, 74 Pac. 938, at the time of sale of stock by a corporation, it agreed to repurchase if the buyer was dissatisfied.

It was claimed that the transaction amounted to secretly allowing the subscriber to withdraw his subscription. In this connection the Court said:

> "Did such purchase secretly allow a subscriber to withdraw his subscription? It must be remembered that appellants did not become subscribers for any stock of the respondent company, and therefore there could have been nothing due to the company from them as subscribers. By the transaction they became the *bona fide* owners of the stock as full paid, and could never be called on, at least by the company, to pay any further sum on the stock. Therefore, the numerous cases relied on by the counsel for the respondent of secret contracts between a corporation and a subscriber for stock, by which the subscriber's liability for further payment on their subscription is released, while excellent law, have absolutely no bearing upon this

case. The Supreme Court of Illinois well says, with reference to these cases: 'So the question is not whether applicant may release the village from paying for and receiving the shares subscribed for, but whether appellant has power to purchase shares of its own stock, paid for, issued to, and held by the village.' *Chicago, Pekin, etc., Ry.* v. *Marseilles,* 84 Ill., 643. In the following cases, among others, contracts similar to the one in question were held not to be *ultra vires,* and were enforced against the corporations: *Browne* v. *Paul Plow Works,* 62 Minn., 90, 64 N. W., 66; *Vent* v. *Duluth C. & S. Co.,* 64 Minn., 307, 67 N. W., 7; *Freemont Carriage Co.* v. *Thomsen* (Neb.), 91 N. W., 376; *C. P. & S. W. R. R.* v. *Marseilles,* 84 Ill., 145; *Howe Grain, etc., Co.* v. *Jones,* 21 Tex. Civ. App., 198, 51 S. W., 24; *New England Tr. Co.* v. *Abbott,* 162 Mass., 148, 38 N. E. 432, 27 L. R. A., 271; *West* v. *Averill Co.,* 109 Iowa, 488, 80 N. W., 555. We are satisfied from the foregoing authorities that the contract was a valid and enforceable one, and that the Court erred in holding that it was *ultra vires.*"

II.

THIS WAS THE CASE OF A CONDITIONAL SUBSCRIPTION AND AS SUCH IS NOT WITHIN THE RULE OF THE CASES CITED BY APPELLANT.

Preliminary to discussing the phase of the case, we desire to emphasize some portions of the findings:

1st. When the original incorporators met and agreed on the terms of organization, it was agreed among them that if Wood did not take stock any

money coming to him should be paid to him not later than July 1, 1908 (p. 72). Wood at the time was not in Fairbanks, so as far as he was concerned this was the stockholders' own proposal. (Finding XIX, p. 77.)

2nd. While Wood was still away, namely, on February 29, 1908, he offered to sell his *stock*. He had no stock. The authorization for the issuance of the stock did not take place until March 12, 1908 (p. 75). What Wood referred to when he offered to sell his "stock" was his "future right" to stock.

3rd. On his return he signed an agreement. This was between the new bank and the partners. It contained a clause requiring him to take stock for his share of the assets of said partnership (p. 77). *But with an oral understanding between himself and the officers of said bank that he might have in accordance with said resolution, until July* 1, 1908, *to elect either to take stock in said corporation or cash for his share of the assets of said partnership so transferred to said corporation* (p. 78).

There was nothing "secret" about the oral understanding. It emanated originally from the subscribers themselves.

4th. As evidence of the intention of all parties to leave the matter open and optional with Wood, is the fact that the certificate for 130 shares made out in his name was never detached from the stock book (p. 80).

Appellant asks:

(a) Could the Fairbanks Banking Company purchase its own stock especially out of its capital?

(b) If it could not, can the receiver now recover the purchase money?

As to the first of these propositions, we beg to refer the Court to our brief in No. 2528, in which the question is fully discussed at pages 80 *et seq.*

In that case there was nothing in the pleadings to show what the law of Nevada was on the subject of the purchase of its own stock by a corporation.

In this case counsel has pleaded the Nevada law (p. 15) relating to stock purchased by the corporation at delinquent sales, but there is nothing in his complaint to show that the Nevada law forbids a corporation to purchase its own stock in any other case.

The pleading must be taken most strongly against the pleader.

Coming now to the effect of the contemporaneous oral understanding between Wood and the company, we find the authorities harmonious on the proposition that a corporation may sell its stock with an agreement to repurchase which is enforceable even in those jurisdictions which forbid a corporation to purchase its own stock.

In the case of *Porter* v. *Plymouth Gold Mining Co.*, 74 Pac., 938, the appellants had purchased 4000 shares of the capital stock of respondent for $2000.00. At

the time the purchase was made the respondent agreed in writing with the appellants if, at the expiration of six months from date of sale, appellants should become dissatisfied with the stock or its earning power as an investment, they should be entitled to return the stock to said respondent upon notifying respondent of their intention so to do, and that respondent should relieve them from all liability thereon, and repay to them the said $2000.00 with interest at the rate of eight per cent from date of payment. The Court said:

> "Two objects were evidently in the minds of the contracting parties at the time this contract was entered into, which were sought to be accomplished by the contract, viz., the sale of the stock and a contract for its repurchase. The company desired to sell the stock; appellants desired to purchase the same, but were unwilling to do so without the company bound by contract to repurchase it upon the happening of certain events. The purchase and payment of the purchase price was a consideration to the company for its promise to repurchase the stock. There was but one contract, viz., for the sale and repurchase of the stock, each object being a consideration for the other. This contract was entire and indivisible. The sale could not be sustained unless the contract of repurchase could be enforced. Therefore, if a portion of the contract is *ultra vires,* the whole contract must fall. The corporation cannot be heard to say that the sale was valid and the contract to repurchase was void without rescinding the sale and returning the purchase money, thus placing the other party in *statu quo ante.* The appellants have executed the contract of purchase on their part by the payment of the purchase price. The corporation, therefore,

has received from them something of value, which it would not have received except for its contract of repurchase. It cannot be heard to say: 'True, I have received your two thousand dollars, which I promised to return to you upon the happening of certain events, but my promise in that regard was and is beyond my power to enter into, and, although the contemplated events have occurred, I will keep your money, and will not perform my contract. Such action, if allowed, would be a reproach upon the law. It is not honest or right, and right is the basic principle of all law."

In the case of *Dickinson* v. *Zubiate Mining Co.,* 11 Cal., App. Rep., 656, the complaint alleged the conditional purchase of mining stock of the defendant corporation under an express agreement that if plaintiff was dissatisfied with the purchase after examination of the mining property, the company would repay and refund the price of the mining stock. The Court said:

"The transaction did not constitute an unconditional original subscription to the stock of defendant, but was a conditional purchase of stock, which the evidence tended to show had been theretofore issued to another and by him returned to the company. The purchase was made upon conditions fully set forth in a written contract which was contemporaneous with and part of the transaction of purchase. (*Jefferson* v. *Hewitt,* 95 Cal., 525 (30 Pac., 772)). Nor was the agreement secret. On the contrary, it appears from the evidence of witness Sharp that early in January, at least, plaintiff was, through him, advised by the secretary of the company that 'they had a copy of the

agreement in the office, and that the matter would be presented to the board of directors at the next meeting.' Neither was there any want of consideration. The purchase price paid subject to the conditions contained in the agreement was a sufficient consideration for defendant's promise to repay if plaintiff, after inspection of the property, was dissatisfied therewith. In the absence of the rights of creditors being involved, and none appear, we perceive no reason why this agreement should not be enforceable against the corporation. (*Vent et al.* v. *Duluth Coffee & Spice Co.*, 64 Minn., 307 (67 N. W., 701). Says Mr. Cook in his work on corporations (Sec. 83): 'Instead of subscribing for stock, a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered, if corporate creditors' rights do not intervene.' "

In the case of *Schulte* v. *Boulevard Gardens Land Co.*, 164 Cal., 464, the defendant had sold certain shares of stock, with the following agreement: "We further promise and agree on behalf of the Boulevard Gardens Land Company, that should the purchaser of said stock certificate at any time prior to the payment of dividends equaling the face value of said stock wish to sell the same, we will repurchase it at par, etc." The Court said:

"The position of the respondent is that the contracts for the retaking by the corporation of its own shares are illegal and void, as in violation of the provisions of Section 309 of the Civil Code, prohibiting directors of corporations from dividing,

withdrawing or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as provided in the section. The phrase 'capital stock,' as used in this section, and in the section of the Practice Act from which the code provision was drawn, has been construed in various decisions of this Court. Its meaning has been definitely settled to be, not the shares of which the nominal capital is composed, but the actual capital, i. e., assets, with which the corporation carries on its corporate business. (*Martin* v. *Zellerbach,* 38 Cal., 309 (99 Am. Dec., 365); *San Francisco & N. P. R. R. Co.* v. *Bee,* 48 Cal., 398; *Kohl* v. *Lilienthal,* 81 Cal., 385 (6 L. R. A., 520, 20 Pac., 401, 22 Pac., 689); *Tapscott* v. *Mex. Col. etc., Co.,* 153 Cal., 667 (96 Pac., 271); *Burne* v. *Lee,* 156 Cal., 222 (104 Pac., 438). Although the prohibition runs, in terms, only against the directors, the effect of the section is to deprive the stockholders as well of power to do the forbidden acts. (*Kohl* v. *Lilienthal,* 81 Cal., 385 (6 L. R. A., 520, 20 Pac., 401, 22 Pac., 689); *Burne* v. *Lee,* 156 Cal., 222 (104 Pac. 438). * *

"In the case at bar, however, we have something more than a mere attempt by a stockholder to sell, and by the corporation to buy, shares of stock. The plaintiff is seeking to enforce a part of an entire contract under which the stock was originally issued to him. The right to return the stock and to receive the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties, it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay upon a return of the shares, the sum agreed to be paid, is not to be viewed as a new undertaking

arising after the plaintiff has assumed the relation of stockholder. It came into being coincidentally with the contract by which plaintiff became a stockholder. The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulation terms.

"The great weight of authority is in accord with this view. Contracts of the kind under discussion have generally been sustained, this, too, in jurisdictions in which corporations are not permitted to purchase their own stock. (*Browne* v. *St. Paul Plow Works,* 62 Minn., 90 (64 N. W., 66); *Vent* v. *Duluth C. & S. Co.,* 64 Minn., 307 (101 Am. St. Rep., 569, 74 Pac., 938); *Sweeney* v. *United Underwriters Co.* (S. D.), 137 N. W., 379; *Jones* v. *Johnson,* 86 Ky., 530 (6 S. W., 582); see, also, 10 Cys., 416; 2 Cl. & M. Pr. Corp., sec. 475; 1 *Cook on Corporations,* 6th ed., secs. 83, 170."

In the case of *Ophir Consolidated Mines Co.* v. *Brynteson,* 143 Fed., 829, the corporation sold Brynteson $15,000 of shares of its capital stock, with an agreement binding it to return to him $15,000 with interest at the rate of six per cent. per annum eighteen months after the date thereof, if said John Brynteson be not satisfied with the aforesaid investment. The Court said:

"The corporation defendant is incorporated under the laws of Colorado, and it is contended that the contract violates Section 485, Mills' Ann. St. Col., which prohibits the use by corporations of any of their funds 'for the purchase of stock in their own company or corporation, except such as may be forfeited for the non-payment of assessments

thereon.' This agreement is in no sense within the meaning or object of the provision referred to. The stock was held in the treasury of the company to raise funds for improvements, upon such terms of sale as were adopted by the president. The right to so hold and own the stock remains in the corporation until an absolute sale is made. No such sale arose under the agreement in suit. It was of the well-recognized class, known as a contract of 'sale or return,' as defined in *Sturm* v. *Boker,* 150 U. S., 312, 328, 14 Sup. Ct., 99, 104, 37 L. Ed., 1093, where the title passes for the time being, but subject to the option of the purchaser to rescind and return the property within the time stipulated. With the exercise of the option the contract of sale terminates and the right and title of the corporation is restored to its original status. No sale has been accomplished, and no purchase or repurchase arises upon the part of the corporation through this return of its unsold stock. As held in the recent Minnesota case of *Vent* v. *Duluth Coffee* & *Spice Co.,* 67 N. W. 70, such transaction is not *ultra vires,* within the rule applicable to purchase of stock." * * *

"The contention that the contract was fraudulent as to other stockholders and creditors requires no discussion, under the foregoing view that no sale of stock was effected, so that the agreement to repay the investment for purchase money, if the stock was not purchased, called for no diversion of corporate funds—plainly distinguishable from the cases cited of release of subscribing stockholders."

In the case of the *United States Mineral Co.* v. *Camden,* 106 Va., 663, 117 Am. St. Rep., 1028, the defendant sold 25 shares of its capital stock of the par value of $100.00 per share, upon the terms and agree-

ment that within four months it would redeem the stock so issued at its face value, etc. The Court said:

> "There can be no question that the defendant had the power to purchase its own stock under the circumstances of the case stated in the declaration."

If it be contended that the agreement between Wood and the corporation that the stock subscription was to be conditional, is in parol, and that therefore evidence of that agreement would have been inadmissible, our reply is that the rule that parol evidence is not admissible to vary the terms of a written agreement, is a rule of evidence only, and could only be invoked by the bank in the event that it had brought suit upon the subscription, and the defendant undertaken to set up the parol agreement in defence. If, however, the parol agreement were in fact made and the bank knew it and chose to perform its contract according to the actual agreement rather than to invoke a technical rule in order to evade it, and if the parties were governed solely by the agreement actually made, and not by the means of proof of it, and chose to perform that contract as agreed upon, the executed contract would be binding upon all concerned. The rule as to a parol modification of a written contract would have no bearing.

Indeed even in the teeth of a statute forbidding the modification of a written contract except by an agreement in writing or an executed oral agreement, it is

held that an oral agreement may be substituted for a former written contract and that it is not a modification of the written contract provided the substituted oral agreement is valid and enforceable.

Pearsall v. *Henry,* 153 Cal., 314.

A fortiori if the substituted oral agreement has been completely executed.

III.

THE AGREEMENT IS EXECUTED AND IT IS NOW TOO LATE TO SET IT ASIDE.

It appeared from the findings that at the meeting of the Board of Directors of the corporation, held on March 12, 1908, a resolution was passed to the effect that should this defendant not take the full amount of stock he was entitled to in the new corporation, the balance of the amount not so taken should be paid to him not later than July 1, 1908 (p. 5). At this time the defendant was still in Seattle. When he returned and signed the subscription agreement this question came up again, and the understanding was expressly had in conformity with the resolution. Up to that time Wood had not signed the subscription contract, but it is plain from the finding that it was the understanding and intention of all concerned that he was to be left free to take cash in lieu of stock. It was further confirmed by the fact that the certificate of stock was

never in fact issued to him, and finally when on his retirement from the corporation he asked for, and the bank paid him the $13,000.00, as had been agreed upon, the oral understanding had become an executed agreement.

IV.

NONE BUT A CREDITOR WHO WAS SUCH AT THE TIME WOULD HAVE A RIGHT TO COMPLAIN.

The complaint fails to show that at the time the stock was taken over and the money paid there were any existing creditors of the bank, and fails to state that any then existing creditors of said bank have not been paid. The law is well settled that "creditors whose debts were contracted subsequent to the reduction of capital stock can only look to the capital stock as reduced, for security."

1 *Cook on Corporations,* 289.

"Corporate creditors who become such after the reduction of the capital stock has been made cannot complain that such reduction was irregularly made and that the holders of the cancelled stock are consequently still liable."

1 *Cook on Corporations,* 289.
Hepburn v. *Exchange,* 4 La. Ann. 87.
Palfrey v. *Paulding,* 7 Pa. Ann., 363.

Cooper v. *Fredericks,* 9 Ala., 738.
Re State Ins. Co., 14 Fed., 28.
Gade v. *Forrest,* 165 Ill., 367; 46 N. E., 286.

In *Mannington* v. *Hocking Valley Ry. Co.,* 183 Fed., 146, it is said:

> "The controversy in this case is wholly between the corporation and four of its stockholders. No creditor is complaining, and no one can complain, because the recitals in the articles of incorporation were notice to him of the reserved right to redeem. Future creditors cannot complain, because they will be held to have given credit upon the amount of the stock then outstanding. They cannot even claim that the repurchase was irregularly made. Cook, Corp. (4th Ed.), Sec. 289."

And in *Thomas* v. *Wentworth Hotel Co.,* 117 Pac., 1041, it is said:

> "Stating the rule in its general sense, it is correct to say that a stockholder may not be released from liability on his contract of subscription without the consent of his fellow stockholders, as well as that of the creditors of the corporation. The reason for the rule is found in the doctrine, now thoroughly established by the decisions of the American courts at least, which views the subscribed capital stock of a corporation, both paid and unpaid, as trust fund, which the stockholders and creditors have the right to insist shall not be reduced, diminished, or impaired, except with their consent. *Thompson on Corporations,* Vol. 1, par. 765; *Morgan* v. *Struthers,* 131 U. S., 246, O. Supp. Ct., 726, 33 L. Ed., 132. In considering the application of the rule just stated, however,

it must be kept in mind that the creditor of a corporation is not a direct party to the contractual relation entered into between the corporation and a subscriber to its capital stock. Under the trust fund theory, the creditor is presumed to have given credit upon the faith that the working capital of the corporation, whether actually paid in or promised to be paid, will be kept available to satisfy his debt. The corporation, then, cannot, without committing a fraud against such creditor, wipe out the fund, either by returning the money paid by subscribers or releasing the obligors on their unpaid subscription contracts.

"The rights of the creditors, nevertheless, do not extend so far as to permit him to interfere and prevent a stockholder from altering his relation toward the corporation with respect to his membership therein as a holder of its shares. It must be admitted that a solvent stockholder may make a valid agreement with the corporation, securing first the consent of all the other stockholders thereto, by which he may surrender his stock and be released on his subscription contract. Such an agreement will be valid and binding upon the corporation, although it may not prevent *existing creditors* from having recourse against the retiring stockholder, to compel contribution from him, in satisfaction of their claims, in an amount proportionate to the unpaid balance of his subscription. In what has just been said, we have referred to releases made by consent, and where no consideration of doubtful claims or compromises with insolvent or irresponsible subscribers enters into the transaction. This for the purpose of pointing out that a creditor may not complain of the act of a corporation in waiving its right to enforce relinquishment of his shares of stock. As the creditor may only be damaged by a cancellation of the subscription liability, and if this liability remains

> with the subscriber after his withdrawal from the corporation, for the benefit of the complaining and non-consenting creditors, that is all that such creditors have any right to demand or insist upon."

The rule that the property of a corporation is deemed a trust fund for creditors is wholly a creation of the courts of equity, and only those having equitable rights in the fund at the time of its depletion have a right to resort to such fund to satisfy their claims. "Creditors of the corporation are not presumed to have relied upon the property of their debtor which it did not possess when the indebtedness accrued, and are therefore not held to have an equitable claim therein."

Marvin v. *Anderson,* 87 N. W., 226.

McDonald v. *Dewey,* 202 U. S., 510, was a suit instituted by the receiver of the First National Bank of Orleans, Nebraska, to enforce an assessment of $86.00 a share on 105 shares of stock of said National Bank. The said assessment having been made upon May the 20th, 1897. It was claimed that Charles Dewey, who was the original owner of said 105 shares of stock, sold the same in 1894, at a time when the bank was insolvent, to a person whom he knew to be irresponsible, and it was claimed by the receiver that this was in fraud of the rights of creditors. The Court in this case laid down the rule, that in the event of the insolvency of the bank at the time

said shares were transferred, it was only existing creditors who could claim to have been damnified by the fraudulent transfer of the shares, and as to them, such transfers were voidable. Subsequent creditors were apprised by the published report as to whom transfers had been made and of the persons to whom they had recourse for double liability. The Court said:

> "The injustice of holding a stockholder liable for an indefinite time in the future, to creditors who were apprised of the name of the stockholder by the published list, is too manifest to require an extended comment. . . . There are undoubtedly cases in which we have used the general expression that in the event of a fraudulent transfer of stock, the stockholders remain liable to the creditors of the bank, but in none of them were we called upon to discriminate between existing and subsequent creditors, since as a rule the insolvency of the bank followed soon after the transfer, and the distinction was not called to our attention by counsel. *It is manifest from the authorities and also upon principle that the trust fund doctrine created by the Courts of equity can only apply to existing creditors.* As stated in *Marvin* v. *Anderson,* creditors of the corporation are not presumed to have relied upon the property of their debtor which it did not possess when the indebtedness accrued, and so therefore, we think it clear that only existing creditors can complain."

If this is so, it was necessary for the complaint to show and the Court to find there were existing creditors at the time of the payment of the $13,000.00 for

the Wood stock, and if there were existing creditors that they had not been paid. The mere fact that the complaint in this case alleges the insolvency of the bank at the time of the payment of said money, does not alter the situation for the Court did not find that the bank was *insolvent* at the time.

V.

AS A CONDITION PRECEDENT TO THE ACTION THE STOCK SHOULD HAVE BEEN TENDERED BACK.

In an action by a corporation against a former stockholder to recover money paid him by its president for his stock on an *ultra vires* purchase thereof for plaintiff, the complaint does not state a cause of action if it fails to show that plaintiff has returned or offered to return the stock.

Bank of San Luis Obispo vs. *Wickersham*, 99 Cal., 655, 34 Pac., 444.

In that case the Court said:

> "The demurrer was, however, properly sustained upon the other ground stated therein. The complaint does not state facts sufficient to constitute a cause of action. The plaintiff is not entitled to any relief because of the alleged fraud practiced upon it in the sale of the stock without a complete rescission of the contract of sale; and to effect this it was incumbent upon plaintiff to act with reasonable diligence, and return, or offer to return, to defendants the stock received from them under the

contract. It cannot be permitted to retain the shares of stock thus received by it, and at the same time recover from the defendants the money paid to them as the purchase price of such stock. This would be contrary to justice and can receive no countenance in a court of equity. There is no averment in the complaint of any offer on the part of plaintiff to return the stock purchased, and plaintiff apparently rested satisfied with the contract for more than 15 years.

See also

Plymouth vs. *Plymouth Gold Mfg. Co.*, 74 Pac., 938;
Schultz vs. *O'Rourke*, 45 Pac., 634.

VI.

THE FINDINGS DO NOT WARRANT THE CONCLUSION THAT NO CONSIDERATION WAS RECEIVED BY THE BANK FOR THE $13,000.00.

On the contrary it appears from the findings that the valuation of the resources by the partnership was fixed by agreement (p. 75) and that, as stated by the Court below in its opinion which was written in the case of *Noyes* vs. *Jesson*, submitted on the same testimony as the case at bar (p. 68):

"While considerations other than the issuing of stock were paid to the partnership, the whole transaction was essentially one involving the issue of stock of the corporation for property, and the laws of Nevada, under which the corporation was or-

ganized, and by which the liability of the defendants, must be determined, provides:

"'Any corporation existing under any law of this State may issue stock for labor done, or personal property, or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive'" (No. 2528, p. 1212).

The fact that some of the assets subsequently proved to be worth less than they were taken over at is of no moment, provided at the time they were honestly valued at the price paid. *The findings nowhere declare that the assets were not worth what was paid for them.* Of course with the benefit of hindsight we can now look back at the list of assets and pick out those that time has proved to be worth one hundred cents on the dollar, and these would include a large proportion of the so-called "doubtful account" (Finding XXII). But at the time these assets were turned over, they had to be valued in the light of the information then attainable. It is conceivable that the Gold Bar stock might have been considered by the directors as worth more than they were allowing for it and caused them to be more liberal in their acceptance of some of the paper than they would have been otherwise.

Nothing was allowed or asked for the good will of the old bank. A bank which has assets of over a million and a quarter dollars is certainly entitled to some-

thing for going concern value. All of which may properly have entered into the valuation placed by the directors upon the assets and business of the co-partnership.

In his endeavor to compute mathematically the value or non-value of Wood's interest in the copartnership, counsel has resorted to the payment of the accrued interest on the notes transferred from the partnership. He says "It therefore appears from the findings of "the court that by taking up worthless Tanana Elec- "tric Company notes of $27,997.38 and the payment of "$39,642.81 as accrued interest $67,640.19 were al- "lowed the partners for which no assets were trans- "ferred to the corporation and which completely "wipes out the pretended excess of $52,000 over lia- "bilities which was the consideration for stock."

This interest was an asset of the corporation over and above the face of the notes. It was not computed until after the resolution of March 23, 1908, which directed that it be computed to March 15, 1908 and placed to the credit of Barnette, Hill and Wood (Finding XXXIII).

This interest if previously computed and credited to Barnette et al. would have shown them entitled to a larger credit than the $52,000 which they were allowed to take in stock or cash.

VII.

THE FINDINGS DO NOT DISPOSE OF ALL THE ISSUES TENDERED BY THE PLEADINGS, AND THE PRESUMPTION ON APPEAL IS, THAT THE OMITTED FINDINGS IF MADE WOULD HAVE SUSTAINED THE JUDGMENT.

It appears from the record that the defendant set up, among other defences, that there had been a complete accord and satisfaction between the plaintiff and one E. T. Barnette, who was a joint tort-feasor with defendant in respect of the act complained of, and that defendant had been thereby released (pp. 60-62). This defence was traversed by the reply, thus directly joining issue (p. 64). There was no finding whatever upon this subject.

It is entirely consistent with the record here that the defendant may have requested from the Court below findings upon the issues presented in the answer and reply, and that he may have excepted to the Court's omission to make such findings, yet judgment has been rendered in his favor. Suppose the evidence sustained this defense, and the omission of the Court to make the proper findings were erroneous, the judgment having been rendered in defendant's favor he cannot appeal for he does not want to reverse the judgment. The plaintiff, however, appeals and bringing up only the findings actually allowed, and omitting to bring up the evidence, presents a case on the record different from the case in the Court

below. It is even conceivable that he might show himself apparently entitled to a judgment, while the whole record would have shown the contrary.

Every intendment on appeal is in support of the judgment below, and it must be presumed here that the omitted findings if they had been actually made would have sustained the judgment.

In *James* vs. *Williams,* 31 Cal., 211, it was held that

> "If the court does not draw up a written finding of all facts put in issue, and no exception is taken for want of a finding, the presumption is that those facts necessary to sustain the judgment and not contained in the findings were found by the court."

In *Sears* vs. *Dixon,* 33 Cal., 327, the Court said:

> "Under the provision of section one hundred and eighty of the Practice Act, as amended in 1866, if the losing party appeals, without having moved for a new trial, or without having excepted to the findings as defective, the written findings are of no value for any purpose to the prevailing party; nor are they of benefit to the losing party, unless they contain facts that are repugnant to or inconsistent with the judgment. The prevailing party needs no written finding. If he is not entitled to recover upon proof of the facts he alleges, a finding will not aid him, and if he is so entitled, and the decision is for him, he needs no written finding, for it is presumed that the facts essential for the support of the judgment were proved. And on the other hand, the losing party is neither benefited nor injured by the finding or the absence of a find-

ing of the facts, which, if proved, entitle the opposite party to a judgment. He is interested only in having the finding state facts repugnant to or inconsistent with those upon which the opposite party relies, whether recited in the finding or not. In other words, he is interested in having error affirmatively appear. Previous to the Act of 1861, findings were required to support the judgment; but under that Act and section one hundred and eighty above mentioned, where there is no exception on the ground that the finding is defective or wanting, it is only requisite that the finding shall not be repugnant to or inconsistent with the judgment."

In *Shelby* vs. *Houston,* 38 Cal., 410, it is held:

"If the appeal is allowed to stand upon the findings, the judgment will not be reversed, because all the facts requisite to sustain it have not been found; on the contrary, the missing facts will be presumed to be consistent with the judgment."

In *Steinback* vs. *Krone,* 36 Cal., 303, it is held:

"Where judgment for plaintiffs is rendered upon general or special findings for them, without, however, containing any reference to or express findings upon issues tendered by the answer in bar of the action, it will be presumed that all the tendered issues were found against the defendants."

And in *Lovell* vs. *Frost,* 44 Cal., 471, the Court said:

"Where there is no finding on an issue, it will be presumed on appeal that the court found in favor of the prevailing party."

> "If the court does not expressly find on the issue made, it will be presumed that the finding on that issue was in favor of the prevailing party."

More vs. *Lott,* 13 Nev., 380.

Smith vs. *Cushing,* 41 Cal., 97, was an action of ejectment. The defendant appealed and the case came before the Supreme Court on the judgment roll. The Court said:

> "When the complaint states facts sufficient to entitle the plaintiff to a recovery and the court orders judgment for plaintiff, whether any findings are filed or not, and if filed whether or not they cover all the issues tendered in the action, defendant cannot maintain the position that the facts as found do not sustain the judgment, unless he can show that such facts, or some of them, are opposed to or inconsistent with the judgment."

and the Court held that the presumption in such a case is that the court below found on the facts in issue for the plaintiff, unless the contrary appeared from the findings themselves.

In *Emmal* vs. *Webb,* 36 Cal., 197, the Court said, page 202:

> "This finding is meager. Many of the issues are not found, and some, if they can be said to be found at all, are found inferentially instead of directly as they should have been. . . . The statute provides that a judgment shall not be reversed for the want of a finding, or for a defec-

tive finding. Under this provision we have repeatedly held that material facts not found must be presumed to be consistent with the judgment."

In *Thompson* vs. *O'Neil,* 41 Cal., 685, the Court said:

"The action is ejectment, and was tried before the Court without a jury. Written findings were filed, and a judgment entered for the defendant, from which the plaintiff appeals on the judgment roll alone, unsupported by a statement on appeal. The ground of error relied upon is that, on the facts expressly found, the plaintiff, and not the defendant, was entitled to judgment. But we must presume, in support of the judgment, that the Court found not only the facts included in the written findings, but also such other facts within the issues as are necessary to support the judgment. It is not enough that the written finding do not, of themselves, warrant the judgment; but to procure a reversal, the express findings must be absolutely inconsistent with the judgment, conceding all the other facts within the issues to have been found in accordance with it."

All facts within the issues, not expressly found and not inconsistent with the other findings, are presumed to have been found in accordance with the judgment.

Servanti vs. *Lusk,* 43 Cal., 238.

If the findings of facts are silent on certain issues, the presumption is that the finding on those issues was such as to support the judgment.

Smith vs. *Penny,* 44 Cal., 161.

VIII.

THE APPEAL SHOULD BE DISMISSED.

This is a proceeding in equity in which the appellant has sought to review upon the appeal a question of law alone.

He has not brought any of the evidence here.

> "Equity cases must be brought up by appeal which brings up the entire record upon facts as well as the law. Cases at law can only be brought up by writ of error, which simply brings up the record for correction of errors of law; that is to say, a writ of error carries up nothing but questions of law and these questions are to be determined according to the facts found in the record. An appeal carries up everything. It substitutes the higher court in place of the lower and all questions whether of fact or of law, depending upon evidence or law, may be re-examined by the appellate court just as they were originally examined by the lower Court having original jurisdiction."
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> *Stevens* vs. *Clark*, 62 Fed., 321.

It is respectfully submitted that appellant has not brought before the Court a record upon which this appeal can be properly determined.

Appellee respectfully moves the Court accordingly to dismiss the appeal pursuant to the provisions of

subdivision 8 of Rule 23 of this Court, and that the judgment be affirmed.

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